STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM J. HANSON, REBECCA HANSON, and THOMAS H. HANSON,

Plaintiffs/Counter-Defendants-Appellees,

v

HERBERT A. SUMMERS and LINDA L. SUMMERS,

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs-Appellants,

and

WILLIAM A. WILSON and MARION L. WILSON,

Defendants,

and

WILLIAM B. PETZ, WILLIAM NOONAN, and WILLIAM SCOTT,

Third-Party Defendants.

UNPUBLISHED
September 22, 2000

No. 214536
Presque Isle Circuit Court
LC No. 94-001989-CH

Before: Fitzgerald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

This case involves a quiet title action regarding a small strip of land, to which both plaintiffs and defendants claim title by deed from a common grantor. The circuit court granted summary disposition

to plaintiffs and quieted title to the property in their favor. In addition, the circuit court entered an involuntary dismissal of defendants' counterclaim for adverse possession of the property. Defendants appeal as of right from both decisions. We affirm.

In this case, third-party defendant William Petz served as common grantor to both plaintiffs and defendants. Petz and his business partners acquired a fairly large parcel of undeveloped land in Presque Isle County. Shortly thereafter, Petz sold a forty-one acre parcel of that land to defendants, for use as hunting property. The legal description of the property which Petz deeded to defendants was:

> Commencing at the Northwest corner of Section 27, T34N, R5E, thence S'ly 1632.31 feet, thence E'ly 1100 feet, thence N'ly 1632.31 feet, thence W'ly 1100 feet to point of beginning. Being 41.22 acres more or less, *EXCEPT the S'ly 66 feet x 1100 feet which is a road and/or utility right of way and EXCEPT all oil, mineral and gas rights.* [Emphasis added.]

The property retained by Petz, approximately 130 acres, was located mainly to the east of defendants' property. Petz subsequently conveyed that remaining property to plaintiffs. The legal description of the property which Petz deeded to plaintiffs was:

> The N ½ of the NW ¼; the NW ¼ of the NE ¼; and the N ½ of the N ½ of the SW ¼ of the NW ¼; Section 27, T34N, R5E; EXCEPT: A parcel of land described as: Commencing at the Northwest corner of said Section 27, T34N, R5E; thence Southerly 1,632.31 feet; thence Easterly 1,100.00 feet; thence Northerly 1,632.31 feet; thence Westerly 1,100.00 feet to Point of Beginning; EXCEPT: the Southerly 66.00 feet x 1,100.00 feet of the above exception.

As apparent from the above legal descriptions, Petz conveyed his remaining interest to plaintiffs, excepting the property which he had previously conveyed to defendants.

Plaintiffs and defendants now contest ownership of a small strip of land referenced in both deeds. That strip of land is 66 feet wide by 1,100 feet long, and runs along the entire southern boundary of defendants' property. The disputed strip of land contains a roadway which forms the sole access to plaintiffs' otherwise landlocked property. Defendants argue that the deed they received from Petz conveyed the strip of land to them, subject to an easement interest. Plaintiffs argue that the deed did not convey any interest in the disputed strip of land to defendants. Rather, they argue that the deed specifically excepted the disputed strip from the property conveyed to defendants. Therefore, as successors in interest to Petz, plaintiffs claim title to the disputed strip of land. The trial court initially examined the language of defendants' deed, to determine whether title to the disputed strip of land was conveyed to defendants. However, the court concluded that the grantor's use of the term "except" rendered the description in the deed ambiguous, requiring an evaluation of parol evidence to determine the grantor's intent. The parties then deposed Petz and defendant Herbert A. Summers, and subsequently filed cross-motions for summary disposition under MCR 2.116(C)(10). The court granted summary disposition to plaintiffs, concluding that the totality of the language in the conveyance and Petz's deposition testimony demonstrated his intent to except the disputed strip of land from the

conveyance to defendants. The parties proceeded to trial on defendants' counterclaim of adverse possession and the trial court granted plaintiffs' motion for involuntary dismissal at the close of defendants' proofs.

First, defendants argue that the trial court erroneously granted plaintiffs' motion for summary disposition. We review de novo a trial court's determination on a motion for summary disposition. *Grebner v Clinton Charter Twp*, 216 Mich App 736, 740; 550 NW2d 265 (1996); *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). A motion for summary disposition may be granted if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). In making that determination, a court must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkely*, 461 Mich 73, 76; 597 NW2d 517 (1999). The court must give the benefit of any reasonable doubt to the party opposing the motion, and inferences are to be drawn in favor of that party. *Paul v Lee*, 455 Mich 204, 210; 568 NW2d 510 (1997); *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987).

Generally, if a legal description in a deed or other instrument is unambiguous, it must be construed as written. *Gawrylak v Cowie*, 350 Mich 679, 683; 86 NW2d 809 (1957). "Where uncertainty or ambiguity exists in a deed the intent of the parties may be gathered from surrounding facts and circumstances to enable the court to reach the probable intent of the parties in order that the court may give it effect." *Weimer v Gilbert*, 7 Mich App 207, 212-213; 151 NW2d 348 (1967). "Deeds are contracts, and, when courts can ascertain from the deed itself the intent of the grantor, the deed will be construed so as to give that intent effect, and that intent will be carried out 'as the mass of mankind would view it,' and not in accord with the technical definition of the words." *Negaunee Iron Co v Iron Cliffs Co*, 134 Mich 264, 279; 96 NW 468 (1903). Whatever is excluded from the grant by exception remains in the grantor as of his former title or right. *Id*. A grantor who states in his deed that he excepts a certain portion of the land because he wants it for a certain purpose cannot be held to have conveyed that which he has expressly excluded simply because he afterwards devotes the land to a different purpose. *Thomas v Jewell*, 300 Mich 556, 560; 2 NW2d 501 (1942); *Peck v McClelland*, 247 Mich 369, 371; 225 NW 514 (1929).

In this case, the trial court looked outside the four corners of the deed and considered parol evidence to determine whether the disputed property was conveyed to defendant. Contrary to the trial court's finding, we conclude that the legal description contained in the deed was not ambiguous. The plain language of the deed reveals that the disputed strip of land was excepted from the property conveyed to defendants. We disagree with defendants' argument that the language of the deed conveyed fee title in the disputed strip to defendants, retaining only an easement interest in the grantor. Therefore, title to the disputed strip of land remained vested in the grantor, and did not pass to defendants.

This conclusion is supported by the phrase which immediately follows within the deed's property description: "and EXCEPT all oil, mineral and gas rights." If we were to accept defendants' construction of the previous sentence, then we would be compelled to conclude that the deed also

conveyed all oil, mineral and gas rights to defendant, with an easement interest remaining in the grantor. Such a construction defies both common sense and the plain language of the document. Because the deed's clause excepting all mineral rights from the conveyance is so similar to the clause excepting the disputed strip of land from the conveyance, and because it immediately follows the disputed language, we believe that both clauses must be interpreted in the same fashion. Therefore, we conclude that the deed excepted the disputed strip of land from the property conveyed.

In this case, the trial court considered Petz's deposition testimony in order to make a factual finding regarding his intent when drafting the deed to defendants. However, a circuit court may not assess credibility or determine facts when deciding a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Further, "[t]he granting of a motion for summary disposition is especially suspect where motive and intent are at issue or where the witness or deponent's credibility is crucial." *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994). Therefore, we believe that the circuit court erroneously based its grant of summary disposition to plaintiffs on a factual determination which necessarily weighed intent and credibility. Nevertheless, we affirm because we believe the trial court reached the correct result, albeit for the wrong reason. *People v Ramsdell*, 230 Mich App 386, 406; 585 NW2d 1 (1998).

Next, defendants argue that the trial court erred by concluding that they had failed to establish their claim to adverse possession of the disputed strip of land. As an initial matter, plaintiffs misnamed their motion at the close of defendants'/counter-plaintiffs' proofs on their counterclaim as a "motion for directed verdict." Such a motion in a bench trial is properly viewed as a "motion for involuntary dismissal," and it should be granted when the court is satisfied after the presentation of the plaintiff's evidence that "on the facts and the law the plaintiff has shown no right to relief." MCR 2.504(B)(2); *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995).

Actions to quiet title based on a claim of adverse possession are equitable in nature. *Gorte v Dep't of Transp*, 202 Mich App 161, 165; 507 NW2d 797 (1993). Therefore, we review the circuit court's ultimate determination de novo and review for clear error the findings of fact supporting that determination. *Begola Services*, *supra* at 639. We review a decision to grant or deny a motion for involuntary dismissal for clear error and we will not overturn the trial court's decision unless the evidence manifestly preponderates against it. *Phillips v Deihm*, 213 Mich App 389, 397; 541 NW2d 566 (1995); *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 339; 480 NW2d 623 (1991).

To establish adverse possession, the claimant must show that his possession is actual, visible, open, notorious, exclusive, hostile, under cover of claim or right, continuous, and uninterrupted for the statutory period of fifteen years. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995), citing *Thomas v Rex A Wilcox Trust*, 185 Mich App 733, 736-737; 463 NW2d 190 (1990). Mutual use or occupation of property with the owner's permission is insufficient to establish adverse possession. *West Michigan Dock*, *supra* at 511. A determination of what acts or uses are sufficient to constitute adverse possession depends on the facts in each case and to a large extent on the character of the premises. *Davids v Davis*, 179 Mich App 72, 82-83; 445 NW2d 460 (1989). The doctrine of adverse possession is strictly construed, *Yelverton v*

Steele, 40 Mich 538, 541 (1879), and every presumption is made in favor of the holder of legal title. *Sheldon v Michigan Central RR Co*, 161 Mich 503, 512; 126 NW2d 1056 (1910).

In the present case, defendants argue that the following actions established their claim to the disputed strip of property through adverse possession: (1) removal of rocks and wood products from the property, (2) hunting on the property during firearm deer hunting season, (3) enjoyment of yearly picnics on the property, (4) construction of a wire fence along the mistaken boundary, (5) ejection of one trespasser from the property, and (5) payment of taxes on the property.

The trial court made extensive findings of fact regarding defendants' adverse possession claim. First, the court found that defendants harvested cedar boughs from the property, but concluded that this use was seasonal and was not sufficiently open or obvious in the wooded land to put plaintiffs or their predecessors on notice of an adverse claim to the land. In support of this finding, we also note defendant Summers' testimony on cross-examination that he asked for Petz's permission to harvest the cedar boughs, and that Petz granted him access to the road on the disputed strip of land, but denied him permission to cut cedar boughs on his property.

Second, the court found that the deer blinds that defendants erected were at most semi-permanent, and were neither continuous nor sufficiently visible to support a conclusion of adverse possession. Third, the circuit court rejected defendants' claim that they enjoyed regular picnics on the disputed strip of land, given that the property was mainly surrounded by a cedar swamp, was inhabited by black flies, and was not conducive to picnicking. Finally, the court concluded that defendants' fencing of the land tended to support their claim of adverse possession, but noted their testimony that they intended to exclude trespassers, which was of benefit to both the disputed land and that which was undisputedly defendants' land. In sum, the trial court found as a factual matter that defendants did not possess the disputed strip of land in a visible, open, notorious, exclusive, or continuous fashion.

Defendant argues that the circuit court erroneously relied on the fact that defendants misunderstood the location of the true boundary line. We disagree. The court correctly noted that a mistake regarding the true boundary line does not defeat a claim of adverse possession, *DeGroot v Barber*, 198 Mich App 48, 53; 497 NW2d 530 (1993). Nevertheless, considering the facts set forth above, the court concluded that defendants' use of the property was neither open nor notorious enough, was never exclusive, and was at best co-equal with plaintiffs and their predecessors. We believe that the court's findings of fact were supported by the testimony and were not clearly erroneous.

Finally, as noted by the trial court, defendants did not erect a gate until just before the commencement of this action, and defendants never made any attempt to control access to or use of the disputed land by plaintiffs or their predecessors in title. Rather, defendants asked plaintiffs for a key to their gate and received plaintiffs' permission to use the roadway across the back half of the disputed strip. The element of hostility necessary to a claim of adverse possession may not be "made out by a course of 'joint use' of adjoining property by neighbors who once were 'friendly and cooperative.'" *Aalsburg v Cashion*, 384 Mich 236, 244; 180 NW2d 792 (1970).

Thus, the trial court did not err by concluding that defendants failed to establish their claim of adverse possession to the disputed strip of land.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Michael R. Smolenski